United Nations CCPR/C/120/D/2326/2013/Rev.1

International Covenant on Civil and Political Rights

Advance unedited version

Distr.: General
28 December 2017

Original: English

Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2326/2013*, **,

Communication submitted by:	N.K. (represented by counsel, Johannes Jeremias Weldam)
Alleged victim:	The author
State party:	Netherlands
Date of communication:	10 December 2013
Document references:	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 9 January 2014 (not issued in document form)
Date of adoption of Views:	18 July 2017
Subject matter:	Compulsory DNA profiling of child in conflict with the law
Procedural issues:	Admissibility – other procedure
Substantive issues:	Arbitrary or unlawful interference with privacy; due process guarantees for children in conflict with the law
Articles of the Covenant:	14 (4) and 17
Article of the Optional Protocol:	5 (2) (a)

* Adopted by the Committee at its 120th session (3–28 July 2017).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Sarah Cleveland, Ahmed Amin Fathalla, Olivier de Frouville, Christof Heyns, Yuji Iwasawa, Bamariam Koita, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, José Manuel Santos Pais and Margo Waterval. The text of two individual opinions by Committee members Yadh Ben Achour and Yuval Shany is annexed to the present Views.

2.5 On 7 September 2009, the author filed a complaint with the European Court of Human Rights, alleging a violation of her right to respect for her private and family life. On 2 May 2013, the Court found the complaint to be inadmissible.[5]

The complaint

3.1 The author argues that she was subjected to an arbitrary interference with her private life, in violation of article 17 of the Covenant. The DNA Testing Act does not enable the public prosecutor to balance the various interests at stake. In her case, this was reflected by the fact that the public prosecutor had mistakenly sent an order for DNA testing to the author on 26 November 2008, even though she had not yet been convicted at the time. Apparently DNA testing orders are issued automatically without an assessment of the individual case. The grounds for applying the exception provided under article 2 (1) (b) of the Act are not assessed unless an objection is lodged. An objection can be lodged within 14 days from the date on which the DNA sample is taken and it refers to the determination and processing of the DNA profile in the database, not to the actual taking of the sample.

3.2 The author claims that the authorities did not take into account her best interests and that fact that she was still a child at the time of ordering and taking the DNA sample, in violation of article 14 (4) of the Covenant, according to which, in the case of children in conflict with the law, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation. She also claims that her age was not considered when weighing the interests at stake in testing a DNA sample from her.

3.3 The author further claims that her DNA sample was not taken by medical staff but by a forensic police officer. The taking of a DNA sample by someone other than a doctor or nurse is permitted if the applicant gives explicit permission to that effect. In the DNA test report it is stated that the author did not object to the sample being taken by a police officer. However, she states that she did not sign the report or give her express authorization to that effect. Only the person who took the sample and a witness, both forensic detectives of the Hengelo police force, signed the report. The fact that she did not object on her own initiative does not mean that there was explicit consent. As she was a child, she could not have been expected to be aware of the possibility of objecting to the taking of a sample. Even if she had been aware, she could not have been expected to actually object on her own initiative and before two police officers. The author states that she should have been informed about the person who was going to take the DNA sample and the method used and she should have been explicitly asked for her consent with regard to the person taking the sample. As she was a child, the report should have been co-signed by a legal representative.

State party's observations on admissibility

4. On 27 February 2014, the State party objected to the admissibility of the communication on the grounds that the matter had already been examined by the European Court of Human Rights. It states that, before the Court, the author claimed that no weighing of interests had taken place before the DNA sample was collected and that the manner in which it was collected was not in accordance with the DNA Testing Act. The Court declared the case inadmissible. That decision should be taken into account by the Committee, as the author made similar claims to those brought to the Committee, on the same grounds and to some extent with reference to the same treaty provisions. Should the Committee come to a conclusion different from that of the Court the State party would be confronted with contradictory rulings. A finding by the Committee that the communication is admissible or even well-founded would be extremely difficult to reconcile with the Court's conclusions.

[5] The decision of the Court, sitting in a single-judge formation, was communicated to the author by letter dated 10 May 2013. The letter reads: "In the light of all the material in its possession and in so far as the matters complained of are within its competence, the Court found that the admissibility criteria set out in Articles 34 and 35 of the Convention have not been with (*sic*)…".

collection of a tissue sample on the grounds that by obtaining a sample for the purpose of DNA testing the State would be committing an unlawful act.

5.6 The DNA sample is obtained in a manner that sufficiently takes into consideration the interests of the individual concerned. The DNA collection involves very minor interference with personal integrity; cells are obtained from the inside of the cheek using a mouth swab. This method is useful and effective in the investigation of criminal offences and the individual concerned suffers no adverse consequences from the collection and processing, as long as he or she does not commit any future offences. Both the tissue sample and the DNA profile are codified and stored anonymously. This applies to both adults and children.[8]

5.7 The interference with the author's right to privacy was lawful. She had been convicted of a serious offence, namely street violence, for which an alternative sanction was imposed. There was a statutory basis for the DNA collection, the measure served a legitimate aim and there were safeguards in place to ensure that the interference was proportionate.

5.8 With regard to the author's claims under article 14 (4) of the Covenant, the State party is of the view that the taking of a tissue sample from the author for the purpose of DNA testing and the determining and processing of her DNA profile in the DNA database are not contrary to the above provision.

5.9 The State party notes that the DNA Testing Act does not apply to children below the age of 12 (age of legal responsibility). The Act does not distinguish between children and adults because there is no reason to make a legal distinction between them for the purpose of preventing, investigating and prosecuting criminal offences. Therefore, the provisions of the Act are not contrary to children's interest.[9] However, the public prosecutor does have the possibility of weighing the interests involved before ordering that a tissue sample be taken and district courts can examine whether that assessment was correct.[10] That does not mean that, in an individual case involving a minor, a court cannot declare an objection to the determining and processing of a DNA profile to be well founded. There are examples in the jurisprudence whereby, after assessing an objection to the determining and processing of DNA, the court has held that, in the case at hand, the measure would not be relevant to the aims of the Act.

5.10 Regarding the author's claims on the manner in which DNA samples were collected, the State party argues that under the DNA Testing Act, tissue samples must be collected by a physician or a nurse. However, article 3 (3) of the DNA (Criminal Cases) Tests Decree establishes that, "provided the convicted person does not object, samples of cheek cells or hair follicles may be collected from a convicted person by an investigating officer designated for this purpose by the public prosecutor ... who meets the requirements laid down by ministerial order." Article 8 of the Decree states that, to meet the requirements, the investigation officer: (i) must have successfully completed a course on DNA collection given by the Criminal Investigation College and certified by the Police Examination Centre; and (ii) must not be involved in the investigation for which the sample is being taken. Article 4 of the Decree states that the DNA collection must be conducted in the presence of an investigating officer who must draw up an official report. If the collection was taken by a person other than a physician or a nurse, the report should state that the convicted person did not object to that effect. In the present case, the official report of the DNA collection does not show that the author objected at the time. Explicit consent is not required by law. The mere fact that, in a particular case, a tissue sample is being collected from a child is not an

[8] The State party cites the European Court of Human Rights judgment of 20 January 2009 in *W. v. Netherlands*, in which the Court was satisfied that the Dutch DNA Testing Act "contained appropriate safeguards against blanket and indiscriminate retention of DNA records" given that DNA can only be taken from persons convicted of an offence of a certain gravity, and that "the DNA records can only be retained for a prescribed period of time that is dependent on the length of the statutory maximum sentence that can be imposed for the offence that has been committed."

[9] Ibid.

[10] The State party cites a Hertogenbosch District Court decision of 14 November 2008 in the case of a 16-year-old who had been convicted of a crime, in which the court found that the criminal offence could be regarded as a "single youthful indiscretion" and the collection of DNA material would not be relevant to the aims of the Act.

7.2 With regard to the author's statements concerning the errors in DNA investigations, the State party notes that the Netherlands Forensic Institute is an institution accredited to perform DNA tests and is subject to yearly controls of its work quality. The control system includes the registration of anomalies, which vary from technical problems to human errors or contamination, none of which have any repercussions under criminal law.[12] The corrective measures taken to address anomalies are also registered. The number of notifications (1,900) rose in the period 1997 to 2010 simply because of the increase in the number of DNA analyses done every year and the use of increasingly sensitive equipment.

7.3 The State party insists that street violence committed against persons in association with others cannot be dismissed as "youthful impetuosity". Both the children's judge at the Almelo District Court and the Arnhem Court of Appeal considered that the author had been proven guilty of this offence. The Court of Appeal considered that the author had no criminal record and that she was very young when she committed the offence. It therefore reduced the penalty on that basis — not because it considered the offence not to be serious.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol.

8.2 The Committee notes the State party's argument that the same case had already been considered and declared inadmissible by the European Court of Human Rights. However, the Committee observes that the case is no longer pending before that Court. In the light of the foregoing, the Committee considers that there is no obstacle to the admissibility of the communication under article 5 (2) (a) of the Optional Protocol.

8.3 The Committee considers that the author has sufficiently substantiated her claims under articles 14 (4) and 17 of the Covenant for purposes of admissibility. As no other issues concerning admissibility arise, the Committee declares the communication admissible, insofar as it appears to raise issues under articles 14 (4) and 17 of the Covenant, and proceeds to its consideration of the merits.

Consideration of the merits

9.1 The Committee has considered the communication in the light of all the information submitted to it by the parties, in accordance with 5 (1) of the Optional Protocol.

9.2 The Committee notes the author's argument that her subjection to DNA testing constituted an arbitrary interference in her private life, in violation of article 17 of the Covenant. She alleges, in particular, that neither her age nor the nature of the crime for which she was convicted were taken into account by the public prosecutor when ordering the DNA testing; that DNA testing orders are issued automatically, without an assessment of the individual circumstances of each case; and that the scope for filing an objection does not include the actual taking of the sample.

9.3 The Committee considers that the collection of DNA material for the purpose of analysing and storing the collected material in a database that could be used in the future for the purposes of criminal investigation is sufficiently intrusive as to constitute "interference" with the author's privacy under article 17 of the Covenant.[13] Even if, as the State party

[12] The State party cites the follow-up study by the Public Prosecutor Service. See Netherlands, House of Representatives, Parliamentary papers 2011-2012, 33000 VI, no. 71.

[13] The Committee concurs with the following analysis by the European Court of Human Rights in the case of *S. and Marper v. the United Kingdom*, judgment of 4 December 2008, para. 72-73: "...In addition to the highly personal nature of cellular samples, the Court notes that they contain much sensitive information about an individual, including information about his or her health. Moreover, samples contain a unique genetic code of great relevance to both the individual and his relatives." "Given the nature and the amount of personal information contained in cellular samples, their retention *per se* must be regarded as interfering with the right to respect for the private lives of the individuals concerned."

DNA testing, the State is committing an unlawful act. However, the State party has not demonstrated that such a remedy would be effective, taking into account, in particular, that the collection of tissue sample is "lawful" under domestic law. The Committee also notes that there is no appeal available against a court decision rejecting the objection to the processing of a person's DNA profile.

9.9 The Committee notes the State party's position that the tissue sample collection involves very minor interference with a person's privacy because both the tissue sample and the DNA profile are codified and stored anonymously. However, the Committee also notes that the tissue sample and the profile are kept for 30 years in cases of serious offences, and 20 years in the case of less serious offences.

9.10 Finally, the Committee notes the State party's argument that the Act does not distinguish between children and adults because there is no reason to make a legal distinction between them for the purpose of preventing, investigating and prosecuting criminal offences and that the Act is not contrary to the best interest of the child. The Committee however considers that children differ from adults in their physical and psychological development, and their emotional and educational needs.[19] As provided for, in, among others, articles 24 and 14 (4) of the Covenant, State parties have the obligation to take special measures of protection.[20] In particular, in all decisions taken within the context of the administration of juvenile justice, the best interest of the child should be a primary consideration.[21] Specific attention should be given to the need for the protection of children's privacy at criminal trials.[22] As explained by the author, her age was never taken into consideration, including throughout the tissue sample collection process, where she was not informed of the possibility of objecting to the sample being collected by a police officer, nor was she informed of the possibility that she could be accompanied by her legal representative.

9.11 Accordingly, the Committee finds that, although lawful under domestic law, the interference with the author's privacy was not proportionate to the legitimate aim of prevention and investigation of serious crimes. Therefore, the Committee concludes that such interference was arbitrary and in violation of article 17 of the Covenant.

9.12 Having concluded that, in the present case, there has been a violation of article 17 of the Covenant, the Committee decides not to separately examine the author's claims under article 14 (4) of the Covenant.

10 The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it amount to a violation of article 17 of the Covenant.

11 In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide individuals whose Covenant rights have been violated with an effective remedy in the form of full reparation. Accordingly, the State party is obligated to, inter alia, provide N.K. with adequate compensation. The State party is also under an obligation to prevent similar violations from occurring in the future.

12 Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy where a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The

[19] See Committee on the Rights of the Child, general comment No. 10 (2007) on children's rights in juvenile justice, para. 10; and CRC/C/NLD/CO/4, paras. 58-59, in which the Committee expressed concern about DNA testing of children in conflict with the law and recommended that the State party eliminate the practice of DNA testing of children in conflict with the law and erase the criminal record of children who have been acquitted or have completed their sentence.

[20] See the Committee's general comment No. 17 (1989) on the rights of the child, and communication No. 2107/2011, *Berezhnoy v. Russian Federation*, Views adopted on 28 October 2016, para. 9.7.

[21] See Committee on the Rights of the Child, general comment No. 10 (2007) on children's rights in juvenile justice, para. 10.

[22] See *S. and Marper v. The United Kingdom*, para. 124.

Annex : **Original: French**

Opinion individuelle (dissidente) de Yadh Ben Achour

1. Dans la présente affaire (n° 2326/2013, *N. K. c. Pays-Bas*), le Comité a retenu une violation de l'article 17 du Pacte, au motif que l'immixtion de l'État partie, du fait du prélèvement par frottis buccal d'un échantillon cellulaire ordonné par un procureur en vue d'établir le profil ADN de l'auteure, constituait une ingérence disproportionnée. Cette immixtion est jugée disproportionnée par rapport au but légitime recherché par la loi néerlandaise sur les tests ADN, qui consiste à prévenir et poursuivre les crimes graves. Je voudrais expliquer dans la présente opinion les raisons pour lesquelles je suis en désaccord avec le Comité.

2. Je voudrais d'emblée souligner que le présent cas n'est pas similaire à celui qui a été jugé par la Cour européenne des droits de l'homme, le 4 décembre 2008, en l'affaire *S. et Marper c. Royaume-Uni*, et qui semble avoir eu quelque influence sur les présentes recommandations. En effet, dans l'affaire *S. et Marper*, les requérants reprochaient aux autorités d'avoir « conservé leurs empreintes digitales, échantillons cellulaires et profils génétiques après la conclusion, respectivement par un acquittement et par une décision de classement sans suite, des poursuites pénales menées contre eux ». La différence est de taille, à tous points de vue.

3. Comme le Comité le reconnaît, l'ingérence en question répond à toutes les conditions de validité requises normalement pour les restrictions aux droits fondamentaux reconnus par le Pacte. Elle est prévue par la loi, répond à un but légitime et présente des garanties suffisantes (détermination précise du champ d'application de la loi sur les tests ADN, test ordonné par un organe judiciaire, possibilité d'objection au prélèvement, recours toujours possible devant un tribunal, anonymat et limitation dans le temps de la conservation des données). Elle respecte par conséquent les prérequis d'une société démocratique. Le Comité ne reproche pas tant à la loi elle-même mais à l'acte de prélèvement et son stockage d'être disproportionnés. C'est ce point qui me paraît discutable. Ni la loi, ni l'ordre du Procureur de procéder au prélèvement, ni son effet dans le temps sur les droits de l'auteure, ne présentent un caractère disproportionné par rapport à l'objectif recherché.

4. Tout d'abord, le Comité lui-même a estimé que le prélèvement d'échantillons cellulaires pour établir le profil ADN était justifié et a été jugé comme nécessaire dans une société démocratique. Par ailleurs, le prélèvement d'échantillon ADN par frottis de l'épithélium buccal n'est pas une atteinte invasive, mais une intervention minimale, en particulier si on l'évalue par rapport au but légitime recherché par la loi. L'auteure reproche à l'État partie de ne pas avoir tenu compte de son âge et de l'intérêt supérieur de l'enfant, internationalement protégé. Cependant, dans son arrêt du 4 mai 2010, la cour d'appel n'a pas ignoré l'âge de la requérante (par. 6.4). Ensuite, la conservation des données est anonyme et n'est donc pas de nature à constituer une atteinte à la vie privée. Par ailleurs, cette conservation des données est limitée dans le temps. Enfin, et surtout, les données personnelles conservées dans la banque de données génétiques concernant l'auteure ont été supprimées, après l'arrêt de la cour d'appel d'Arnhem du 4 mai 2010, réduisant les peines prononcées en première instance.

5. Pour rejeter l'argument de l'État partie concernant la destruction des données relatives à l'auteure après l'arrêt de la cour d'appel, le Comité considère que : « Même si, comme l'indique l'État partie, le profil ADN de l'auteure fut plus tard détruit à la suite de la nouvelle condamnation en appel, [...] l'ingérence dans la vie privée de l'auteure avait déjà eu lieu ». Certes, le prélèvement « avait déjà eu lieu », mais la situation doit être appréciée globalement et dans son ensemble. Nous ne pouvons pas objectivement apprécier ce cas, si l'on procède par fragmentation chronologique, en se focalisant sur le fait que le prélèvement a déjà eu lieu et en oubliant que ce même acte a été tout simplement annulé et réparé par le jeu des mécanismes internes de l'État partie. Pour cette raison, plus aucun reproche ne peut être adressé à l'État partie.

Annex : Original English

Individual Opinion (partly concurring, partly dissenting) by Mr. Yuval Shany

1. I regret not being able to fully share the reasoning offered by the majority of the Committee, underlying its finding that the State party violated the author's rights under article 17 of the Covenant.

2. I fully support the proposition that the best interests of the child should be a primary consideration in the administration of juvenile justice and that due weight should be given to the special physical, psychological, emotional and education needs of children (para. 9.10). I am therefore of the view that the State party should have afforded the author special measures of protection during the process of collecting her DNA sample, including ensuring her ability to object to the collection of the sample by a police officer and her right to be accompanied during the collection by a legal representative. I accept that the State party appears to have failed to meet this 'special protection' standard – the State did not rebut the author's claim that neither she nor her legal representative were informed of the right to object to the collection of the DNA sample by a police office - and that, as a result, the application to the author of a mouth swab in order to collect the sample may have resulted, in the circumstances of the case, in a violation of article 17 of the Covenant.

3. I am, however, unpersuaded by the holding by the majority that the very decision to collect and store the author's DNA sample fell short of the above mentioned 'special protection' standard due to the author.

4. Although the Dutch DNA Testing Act does not distinguish between juvenile and adult offenders, such a distinction is inherent in its application: Since it applies to offenders who been convicted of a serious offence (entailing a maximum penalty of no less than four years), and with regard to whom a sentence involving a deprivation of liberty had been imposed, it only applies to juvenile offenders whose conduct was deemed by the juvenile court to be sufficiently serious to warrant deprivation of liberty under the legal standards applied by juvenile justice system. It has not been alleged to us that the age of the author was not given due consideration by the juvenile court in determining the author's sentence, and – by extension – in determining the applicability of the DNA Testing Act to her. In fact, the decision of the Arnhem Court of Appeal 4 May 2010 to substitute the author's sentence from community service to a fine has resulted in the dis-application to her of the DNA Testing Act and the destruction of her DNA sample.

5. Furthermore, the author has not been able to refute the State party's claim (para. 5.9) that domestic courts can sustain objections to the collection of DNA samples of juvenile offenders based on their age and circumstances of the offence, and have done so in the past. It is also uncontested that a domestic court has considered the personal circumstances of the author when reviewing whether an exemption from the application of the Act is warranted and came to the conclusion that it did not (para. 2.4).

6. I am therefore unable to accept the majority's holding that the age of the author was not taken into consideration by the State authorities in the process leading up to the decision to collect her DNA samples.

7. In addition, no information had been provided to us that should cause us to question the holding of the European Court of Human Rights, according to which the DNA database retained by the Netherlands contains adequate privacy safeguards (the database comprises of encoded data stored anonymously and used only to resolve future crimes), even when applied to minors. [1]

8. As a result, I do not consider it established that the balance struck by the State party in the particular circumstances of the case between the need to protect the public from recidivist criminals and the need to afford minors special privacy protections commensurate with their age was unreasonable. Thus, I do not support the conclusion of the Committee that the very decision to collect from the author DNA samples violated her rights article 17 of the Covenant.